

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAMES T. CLARK,	§	
	§	No. 417, 2005
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	Court Below: Superior Court
	§	of the State of Delaware
STATE OF DELAWARE,	§	in and for Kent County
	§	Cr. I.D. No. 0406016386
Plaintiff Below,	§	
Appellee.	§	

Submitted: March 1, 2006

Decided: May 2, 2006

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 2nd day of May, 2006, on consideration of the briefs of the parties, it appears to the Court that:

1) James T. Clark appeals from his convictions, following a jury trial, of six counts of unlawful sexual intercourse first degree, four counts of unlawful sexual intercourse second degree, and two counts of continuous sexual abuse of a child. He argues that the Superior Court abused its discretion when it instructed the jury that the dates of the offenses are not elements of the crimes.

2) Clark moved in with his girlfriend, Naomi Mitchell,¹ in late December 1995. At that time, Mitchell's two boys, Thomas and Jeffrey, were 7 and 9.² Both boys testified that Clark sexually abused them about once a week for about six months. The abuse stopped when the children threatened Clark that they would tell their mother. Mitchell testified that she knew nothing about the abuse until June 2004, when Jeffrey's girlfriend reported it.

3) All counts in the indictment stated that Clark engaged in the charged unlawful sexual activity during the period between January 1, 1995, and December 31, 1995. But Clark testified that he did not move in with Mitchell until Christmas time 1995. If that testimony was accurate, then the abuse must have occurred during 1996, not 1995. Because of the uncertainty as to the dates of the alleged abuse, the State asked the trial court to instruct the jury that the date of the offense is not an element of the crime, and that proof of when the acts allegedly occurred is sufficient if the offenses were committed within the applicable statute of limitations.

4) On appeal, Clark argues that the trial court abused its discretion in giving the jury instruction requested by the State. He says that the instruction essentially told

¹The Court has given pseudonyms for the names of the victims and their family pursuant to Supreme Court Rule 7(d).

²There is some confusion as to how old the boys were when Clark moved in with them. They might have been two years younger.

the jury to disregard inconsistencies in the witnesses' testimony concerning when the offenses occurred. But those inconsistencies not only created doubt as to when the offenses occurred, they also created doubt as to whether the offenses occurred. Clark contends that the instruction, therefore, impermissibly tipped the balance in favor of the State.

5) As Clark acknowledges, under settled law, the "time when the crime occurred is not an essential element of the charged offense."³ Thus, there is no question but that the jury instruction was a correct statement of the law. Nonetheless, the trial court was not inclined to give the instruction until it learned that Clark was going to use the timing inaccuracies to argue for acquittal:

[U]nless the defense takes a position with the jury that you must acquit because these activities occurred in 1996, and the indictment says 1995, then it doesn't matter if this instruction is in there.⁴

The instruction only became necessary when Clark advised the court that he was going to seek acquittal based on the timing argument. We conclude that the trial court acted well within its discretion in responding to Clark's tactical decision by giving the jury instruction.

³*Phipps v. State*, 1996 WL 145739 (Del. Supr.), citing *Monastakes v. State*, 127 A. 153, 154 (Del. 1924).

⁴Appellant's Appendix, A-74.

6) In addition, we find no merit to the claim that the instruction effectively told the jury to disregard inconsistencies, thereby prejudicing Clark. The instruction simply told the jury that the dates are not elements of the offenses. Clark was free to argue that all the inconsistencies in the witnesses' testimony (about dates and other facts) should raise a reasonable doubt as to whether any crimes had been committed.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court be, and the same hereby are, AFFIRMED.

BY THE COURT:

/s/ Carolyn Berger
Justice